



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**CONSTITUTIONAL PETITION NO. 5 OF 2016**

**IN THE MATTER OF ARTICLES 2, 3 (1), 10, 19, 20, 21,22, 23, 40, 47, 48, 64, 162 (2), 165 (3) & (6), 258 AND 259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 13 (1), 2, 3, 5 AND 7, 14, 17, 20 AND 29 OF THE ENVIRONMENT AND LAND COURT ACT 2011**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010; THE RELEVANT SECTIONS OF THE LAND ACT AND THE ENERGY ACT**

**AND**

**IN THE MATTER OF LAND REFERENCE KABARE/NYANGATI/6123 SITUATED AT KUTUS, KIRINYAGA COUNTY**

**AND**

**IN THE MATTER OF UNLAWFUL ENTRY, ACQUISITION, INTERFERENCE AND/OR UNLAWFUL ENCROACHMENT OF LAND REFERENCE KABARE/NYANGATI/6123 SITUATED AT KUTUS, KIRINYAGA COUNTY**

**BETWEEN**

**AYADEM COMPANY LIMITED.....PETITIONER**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT**

**RULING**

The Petitioner herein (AYADEM COMPANY LIMITED) filed this petition on 1st November 2016 praying for the following orders as against the Respondent (KENYA POWER & LIGHTING COMPANY LIMITED):

*(a) That there be a declaration that the Petitioner's fundamental rights and freedom as*

***enshrined under Article 40 of the Constitution of Kenya have been contravened and infringed upon by the Respondent.***

***(b) That there be a declaration that the Petitioner's fundamental rights and freedoms as enshrined under Article 47 of the Constitution of Kenya have been contravened and infringed upon by the Respondent.***

***(c) In the alternative***

***(i) A mandatory injunction do issue to compel the Respondent to reinstate the suit property to its original form by removal of the electric poles and wires over the suit property.***

***(ii) That the Petitioner be given leave to remove the electric poles and wires at the Respondent's costs.***

***(iii) A permanent injunction be issued to restrain the Respondent by themselves, their agents, servants and/or employees from trespassing or interfering with the Petitioner's quiet and peaceful possession of the property KABARE/NYANGATI/6123.***

***(d) That there be a declaration that the Petitioner is entitled to compensation for the actions of the Respondent of erecting power lines on the Petitioner's portion of land KABARE/NYANGATI/6123 at the current market value plus interest and not the Respondent's proposed value.***

***(e) General damages, exemplary damages and aggravated damages under Article 23 (3) of the Constitution of Kenya be awarded for the violations of the Petitioner's rights by the Respondent.***

***(f) Costs of the petition and interest thereon.***

The petition is founded on **Articles 2, 3, 10, 19, 20, 21,22, 23, 40, 47, 48, 64, 162 (2), 165 (3) & (6), 258 and 259 of the Constitution of Kenya 2010** (hereinafter the Constitution). The Petitioner's case is that it is the registered proprietor of land parcel No. KABARE/NYANGATI/6123 (hereinafter the suit property) and that in September 2014, it noticed transmission pylons erected on land adjacent to the suit property and suspected that the **KENYA ELECTRICITY TRANSMISSION CO. LTD (KETRACO)** was the one responsible and so it instructed its advocate to write to it (annexture **ACL 2**). However, **KETRACO** replied that it was not responsible for erecting the transmission pylons and referred it to Respondent. The Petitioner therefore wrote to the Respondent enquiring if it had plans to erect transmission lines over the suit property vide its letter dated 4th November 2014 (annexture **ACL 5**) but received no reply. On 15th January 2015, the Petitioner's advocate wrote to the Respondent informing them that an officer from their Company had been in touch with one of the Petitioner's directors for a visit to the suit property but that did not materialize and so the Petitioner's advocate wrote another letter to the Respondent enquiring whether they intended to have transmission pylons over the suit land but again there was no response to that letter dated 10th February 2015. On 1st August 2015, the Petitioner received a letter from the Respondent dated 29th June 2015 (annexture **ACL 7**) putting forth the following averments:

***(a) That the Petitioner is presumably aware of the proposed 132 KV transmission power-line SAGANA-KUTUS project.***

***(b) That the power-line traverses the suit property affecting 0.477 Acres thereof.***

***(c) That the Respondent shall compensate the Petitioner for partially taking its land and the total amount due is Ksh. 286,200.***

***(d) That the Respondent hoped the Petitioner would accept this offer.***

On or about 15th August 2015, the Respondent without any colour of right, unlawfully and maliciously

caused power lines to traverse over the suit property thereby violating the Petitioner's Constitutional right to property and so on 2nd September 2015, the Petitioner wrote a letter to the Respondent opposing the letter dated 29th June 2015 on the following grounds:

*(a) The Respondent caused power lines to traverse over the Petitioner's land without its permission.*

*(b) The Respondent acted without the Petitioner's consent.*

*(c) That the Respondent's proposed compensation did not put into consideration the value of the property.*

*(d) That the Respondent went ahead with the project even without the Petitioner submitting a copy of Title Deed certificate and National Identity Card as required.*

*(e) That approximately half of the suit property is affected by the power-lines that have been erected.*

*(f) That the proposed compensation of Ksh. 286,200 was minimal and partly taking into account the market value of the affected land.*

*(g) That the action of the Respondent were without the permission of the Petitioner.*

*(h) That the said acts were in violation of the Petitioner's rights.*

*(i) That the Respondent has deprived the Petitioner a portion of the suit property measuring 0.47 Acres where the total land area is 0.405 Hectares.*

The Petitioner therefore engaged the services of a registered valuer who prepared a report indicating that the whole of the suit property is valued at Ksh. 8 million and the portion used up by the power-lines is valued at Ksh. 2,880,000 (annexture **ACL 10**). The Petitioner therefore moved to this Court alleging a violation of the Constitutional provisions cited above.

The Respondent filed a Notice of Preliminary Objection in which it urged the Court to strike out the petition with costs on the following grounds:

***“That the Honourable Court lacks jurisdiction to entertain the matter by dint of the provisions of Sections 6(1) 49 and 50 of the Energy Act 2006”***

The Respondent also filed a replying affidavit through its way leaves officer **JOHN MURIUKI** in which it is deponed, inter alia, that he was a member of the team that negotiated grant of way-leave to pave way for the construction of the **132 KV SAGANA-EMBU** power-line and among those approached was one **WANGUI MUNYI** the widow of **MUNYI KARARE** the registered owner of land parcel No. **KABARE/NYANGATI/115** measuring 9.1 Hectares. That negotiations were concluded and the property owner duly executed way-leave agreements and in the case of the parcel No. **KABARE/NYANGATI/115** the way leave was granted on 10th June 2011 (annexture **JM 2**) and immediately thereafter, the project commenced in 2012. That it is apparent that later, land parcel No. **KABARE/NYANGATI/115** was subdivided and sold to various land owners including the Petitioner whose suit property was hived from the original land parcel. That despite the new owners being the successors of the rights and obligations created by the way-leave agreement already signed by **WANGUI MUNYI** on 10th June 2011, the Respondent nonetheless formed a negotiating team to engage with them for peaceful co-existence. That the negotiating team commenced valuation of the affected parcels and in its report dated 30th June 2015, it established that the value of the land per acre in the area was Ksh. 1,200,000 and since the affected area is only 0.193 Hectares, the value was tabulated at Ksh. 572,4000 hence the 50% compensation which is the Respondent's standard value for compensation was Ksh. 286,200. That that offer of Ksh. 286,200 was communicated to the Petitioner on 20th June 2016 but it was aggrieved with the amount offered and

obtained its own valuation. That the valuation of Ksh. 8,000,000 which translate at the Ksh. 2,880,000 as value for the portion intended for use by the Respondent is contradictory because the valuation report exhibited by the Petitioner is Ksh. 1,300,000. That this dispute relates to compensation and ought to be arbitrated upon by the **Energy Regulatory Committee** in accordance with **Sections 49 and 50 of the Energy Act 2016** and this petition is an abuse of the Court process since none of the petitioner's rights have been violated by the Respondent. This Court should therefore refer this petition to the **Energy Regulation Commission** for appropriate remedy.

Counsel for the parties appear to have moved even without directions being taken in the matter and filed submissions on the Preliminary Objection questioning this Court's jurisdiction to handle this petition. The Court finds no fault in that because it is a step towards expediting the hearing and determination of this petition which is a key objective of a Court.

Jurisdiction is a matter of law and must be disposed off at the earliest opportunity because without it, a Court must down its tools – **THE OWNERS OF MOTOR VESSEL "LILLIAN S" VS CALTEX OIL KENYA LIMITED 1989 K.L.R 1** where the late NYARANGI J.A stated as follows:

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***

The next issue that I need to determine, and which goes to the core of this Preliminary Objection, is whether infact it is properly raised. It is the submission of counsel for the Petitioner **MR. MAGEE** that the Respondent's Preliminary Objection is only meant to derail this petition because it does not raise pure points of law. Counsel argues that the Petitioner's case is that no permission was granted to the Respondent to erect power lines on the suit land and therefore this is a case of trespass. On the other hand, counsel for the Respondent has submitted that this petition falls within the ambit of **Sections 6 (1), 49 and 50 of the Energy Act** and since it is a claim for compensation, it should be referred to the **Energy Regulation Commission** (the Commission) and this Court therefore lacks the requisite jurisdiction to determine this petition. Counsel for the Respondent referred me to the case of **JOHN MUSAKALI VS SPEAKER COUNTY OF BUNGOMA & OTHERS 2015 e K.L.R** and also my own decision in **ALICE MWERU NGAJI VS KENYA POWER & LIGHTING CO. LTD 2015 e K.L.R.**

A Preliminary Objection was defined by **LAW J.A** in **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696** in the following terms:

***"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"***

In the same case, **NEWBOLD P.** stated that:

***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*** Emphasis added

And coming back home, **OJWANG J.** (as he then was) said as follows in **ORARO VS MBAJA 2005 1 K.L.R 141** at page 145:

***"A Preliminary Objection correctly understood, is now well identified as, and declared to be a***

**point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed**” Emphasis added

It is clear therefore that a Preliminary Objection can only be properly up-held if it raises pure points of law and if there are no contested facts pleaded. The moment that disputed facts are raised which need to be interrogated by the Court, the objection becomes contaminated and cannot qualify as a Preliminary Objection as known in law. Is the Respondent’s Preliminary Objection properly raised? That is what I need to interrogate in the following part of this ruling.

The Petitioner raises a contravention of several rights one of which is a violation of its right to property guaranteed under **Article 40 of the Constitution**. It seeks general, exemplary and aggravated damages for the trespass to the suit property by the Respondent who it claims did not have its consent to erect the power lines through a portion of the suit property. On the other hand, the Respondent through its way-leave officer **JOHN MURIUKI** concedes that it made an offer to the Petitioner for compensation which was apparently not accepted. In his replying affidavit, **JOHN MURIUKI** has deponed in paragraphs 12 and 13 as follows:

**12: “That the Respondent communicated its offer to the Petitioner on 29.6.2016 – annexed and marked as JM 6 is the said communication by the Respondent to the Petitioner”.**

**13: “That it is apparent that the Petitioner was aggrieved with the amount of compensation offered and that is when it went ahead to get its independent valuation whose report is annexed to the petition as annexure ACL 9”.**

Counsel for the Respondent has therefore made the following submissions in support of this Preliminary Objection:

***“Your Lordship, this is clearly a case of the adequacy/inadequacy of compensation and it falls squarely within the ambit of the Energy Regulatory Commission. It is contended for the Respondent that this Honourable Court lacks jurisdiction to determine this matter by dint of Sections 6 (1), 49 and 50 of the Energy Act. Under Section 6 (1) of the Energy Act, the task of investigating disputes like the present one lies with the Energy Regulatory Commission”***

Counsel for the Respondent then goes on to cite **Sections 6, 49 and 48 (2) of the Energy Act**. **Section 6 of the Energy Act** provides for the powers of the Commission one of which is to **“investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act”**. **Section 48** on the other hand deals with objections by the land owners and empowers the Commission to determine the compensation due, if any, while **Section 49** provides for the procedure before the Commission. **Section 50** provides for how the Commission shall deal with issues regarding persons entitled to compensation. All the above provisions presuppose that there has been compliance with **Sections 46 and 47 of the Energy Act** which provides as follows:

**46 (1) “No person shall enter upon any land, other than his own –**

**(a) to lay or connect an electric supply line or**

**(b) to carry out a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land**

**(2) “The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry”**

**47 (1) “Any owner, after receipt of the notice and statement of particulars under Section 46, may**

**assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties being an interest in the land, subject to the following provisions –**

(a) –

(b) – ”. Emphasis added.

It is only after the land owner fails to object to the notice within sixty days after service of the same that he shall be deemed to have assented to the proposal to construct the electric supply line on his land. In this case, it is clear that no notice was served upon the Petitioner as required by **Section 46 (2) of the Energy Act**. The case of **ALICE MWERU NGAI** (supra) is therefore distinguishable and does not aid the Respondent because in that case, the Court found as follows:

***“From the pleadings herein, the plaintiff’s complaint is basically that the defendant, by laying electricity cables over the suit property, are trespassers on her land. It is however clear from the documents availed by the defendant that the plaintiff gave her consent to the construction of the cables on the suit property and she signed the requisite Notice issued under Section 46 of the Energy Act on 12th August 2011. That is not in dispute. She then proceeded to sign the way leave agreement as well as various other agreements detailing the nature of damage/loss and the amount due to her as compensation”.***

Unlike in this case, the Plaintiff in the **ALICE MWERU NGAI** case (supra) had consented to the laying of cables on her land.

The case of **JOHN MUSAKALI** (supra) similarly does not aid the Respondent. That case recognized the Petitioner’s rights to access the Court for redress of a violation of his rights but nonetheless held that other institutions created to protect those rights such as the Political Parties Tribunal must be allowed to perform their functions. This Court held in the same vein in **ALICE MWERU NGAI** (supra) where I said:

***“In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of proper, orderly and efficient administration of justice that proper procedures provided for in the hierarch of dispute resolution be followed and that the organs mandated to arbitrate into such disputes be respected and allowed to perform their statutory responsibilities. That is why those procedures were formulated and such organs established”.***

The circumstances in this petition are different in that by failing to issue a notice to the Petitioner as required by the mandatory provisions of **Section 46 of the Energy Act**, the Petitioner had no opportunity either to assent to the Respondent’s proposal as required by **Section 47 of the Act** or object thereto as required by **Section 48 of the Act**. What the Respondent did therefore took this dispute out of the purview of the Commission as envisaged under the provisions of **Sections 48, 49 and 50 of the Energy Act** and therefore properly invoked this Court’s jurisdiction.

It is also not in doubt that this Court, under **Section 13 of the Environment and Land Court Act**, has the jurisdiction to hear and determine disputes alleging violations or infringements of fundamental rights under the Constitution which is what the Petitioner herein has pleaded.

It is clear from the above therefore that not only are there contested issues that need to be interrogated but most importantly, failure by the Respondent to abide by the provisions of the **Energy Act** meant that the Petitioner’s only recourse was to move to this Court. In his replying affidavit, **JOHN MURIUKI** deponed in paragraph 17 that this Court should refer the dispute to the Commission. The Court would not have had any problem taking that route. However, it is clear from the petition herein that the Respondent

has already erected its power lines on the suit property. It is therefore already too late to invoke the provisions of Section 48 (2) of the Energy Act which empowers the Commission to determine the damage and compensation payable.

The up-shot of the above is that the Respondent's Preliminary Objection dated 12th January 2017 is devoid of merit. It is hereby dismissed with costs to the Petitioner.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**

Ruling dated, delivered and signed in open Court this 19<sup>th</sup> day of May 2017

Mr. Mwangi for Mr. Mwongela for the Respondent present

Ms Kimotho for Mr. Magee for the Applicant present.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**